



October 17, 2018

VIA Electronic Submission
Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
44 12th Street SW
Washington, D.C., 20554

Re: Comments on Interpretation of the Telephone Consumer Protection Act in Light of the Ninth Circuit's Decision in *Marks v. Crunch San Diego, LLC* Decision, CG Docket No. 18-152.

Dear Ms. Dortch,

The Consumer Bankers Association ("CBA")¹ appreciates the opportunity to respond to the Federal Communication Commission's ("Commission") Public Notice regarding the Interpretation of the Telephone Consumer Protection Act in Light of the Ninth Circuit's Decision in *Marks*, CG Docket No. 18-152. As a co-petitioner in *ACA International v. FCC*,² we are surprised by the Ninth Circuit's recent decision in *Marks v. Crunch San Diego*,³ and troubled by its potential implications. Still, CBA and our members remain vigilant in our pursuit of better laws built to protect the necessary and desired communications our members make on a daily basis, and appreciate the Commission's continued efforts on this front.

Customers utilize many useful communications with their financial institutions through calls and texts ranging from low balance notifications to repayment counseling, among other important notices and alerts. CBA's members communicate with their customers to enhance their customers' financial well-being, while helping customers avoid financial crimes and hardship. CBA members seek to better serve their customers in every way possible, and more effective means of communication is a key part of enhancing that relationship.

In light of the D.C. District Court of Appeal's decision in *ACA Int'l v. FCC*, the Commission has a great opportunity to help address many of the concerns consumers and businesses alike have with the arduous TCPA rules. CBA finds the Ninth Circuit's recent decision troubling as it operates contrary to many of the principles espoused in the *ACA Int'l* case, as well as recent

¹ The Consumer Bankers Association is the only national trade focused exclusively on retail banking. Established in 1919, the association is now a leading voice in the banking industry and Washington, representing members who employ nearly two million Americans, extend roughly \$3 trillion in consumer loans, and provide \$270 billion in small business loans.

² *ACA Int'l et al v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) (mandate issued May 8, 2018) (affirming in part and vacating in part *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, WC Docket No. 07-135, Declaratory Ruling and Order, 30 FCC Rcd. 7961 (2015) (*2015 TCPA Declaratory Ruling and Order*)).

³ *Marks v. Crunch San Diego, LLC*, No. 14-56834 (9th Cir. 2018).

cases from the Second⁴ and Third Districts⁵ shedding more light on what constitutes an Automatic Telephone Dialing System (“ATDS”).

While we value this opportunity for further comment on the issue, CBA notes that the original purpose of the TCPA, to curb telemarketing calls and unwanted communications to unwilling consumers, is upheld. To this end, CBA recommends the Commission consider the items herein.

Why the Ninth Circuit Ruled Incorrectly in *Marks*

The D.C. Circuit vacated the Commission’s interpretation of an ATDS in *ACA Int’l v. FCC*, holding that the Commission’s interpretation was “utterly unreasonable,” “incompatible with” the statute’s goals, and “impermissively expansive”,⁶ and essentially, made everyone a “TCPA violator in waiting”.⁷ The recent *Marks* decision from the Ninth Circuit adheres to the principles rejected in *ACA Int’l*, leaving millions of consumers potentially liable for TCPA violations due to the technology currently housed on their cell phones.

The Ninth Circuit’s reading contrasts with the reading in *ACA Int’l*. In *ACA Int’l*, the D.C. Circuit court held that the TCPA unambiguously foreclosed any interpretation of an ATDS that “would appear to subject ordinary calls from any conventional smartphone to the Act’s coverage.”⁸ The Ninth Circuit’s overly-broad decision strayed from *ACA Int’l*, and the TCPA when the Ninth Circuit declared that technologies with the capabilities to store telephone numbers and dial from stored list constitute an ATDS.⁹ The Ninth Circuit’s logic opens this use up to arduous TCPA violations.

Beyond this expansive reading of the statute potentially opening up any individual with a smart-phone to TCPA violations, this interpretation would effectively destroy many business’ means to contact their customers. CBA’s members frequently use lists of stored telephone numbers, provided to them by consenting customers, to contact those customers with important and wanted communications. We feel this use should not be found in violation of the TCPA, and find that the Ninth Circuit’s recent reading goes beyond the statutory definition of an ATDS by separating the ability to store telephone numbers from the key element, “using a random or sequential number generator”.¹⁰ In fact, many dialers store the numbers to be dialed prior to actually dialing, essentially creating a list of stored numbers during the dialing process,¹¹ and opening many dialer’s use up to potential TCPA violations under the Ninth Circuit’s reading.

⁴ *King v. Time Warner Cable*, 894 F.3d 473 (2nd Cir. 2018) (holding that capacity of an ATDS should be interpreted to refer to a device’s current functions, absent any modification to the device’s software or hardware).

⁵ *Dominguez v. Yahoo, Inc.*, No. 17-1243 (3rd Cir. 2018).

⁶ *ACA Int’l*, 885 F.3d at 699-700.

⁷ *Id.* at 693.

⁸ *Id.* At 692.

⁹ See H.R. Rep. No. 101-633, at 3 (1990); S. Rep. No. 102-178, at 2 (1991); 137 Cong. Rcd. H11307-01, H11310 (Nov. 26, 1991) (Rep. Markey, lead sponsor of TCPA).

¹⁰ 47 U.S.C. § 227 (a)(1).

¹¹ See Comments of Noble Systems Corp., WC Docket No. 18-152 & 02-278 (filed June 13, 2018) at 15.

Impacts if the *Marks* Decision Controls

Overly-broad interpretations of ATDS hurt consumers. In the years since the Commission's Omnibus Order¹² broadly interpreted the definition of an ATDS, litigation against legitimate businesses has skyrocketed as they attempt to contact their customers.¹³ With the ever-looming threat of prohibitively expensive litigation hanging over the heads of many financial institutions for every potential call they would make, many financial institutions have been forced to abandon many of the calls their customers want and need.

Some financial institutions find that for those customers who do not have a residential phone line, and have not given consent to their financial institution to contact them through their cell phone, there is a 25% lower chance to contact that customer. Reduced means of contact means financial institutions are often not able to work with customers to best meet their financial needs, including not being able to assist large populations of customers in default and to help customers avoid default altogether. Broadly, customer default rates are lower when financial institutions use automated technology to contact customers regarding their accounts.

Automated technology provides consumer benefits by limiting calls to consumers that cannot be as effectively provided by non-automated processes. This is particularly important in ensuring compliance with other regulations and statutes that govern the number of calls made, the time of day when calls are made, avoiding weekend calls, and the frequency of calls made by financial institutions. The automated technologies threatened by the Ninth Circuit's decision help provide for better consumer outcomes in all of these scenarios.

Further, automated technology provides a less expensive means for financial institutions to contact consumers. Non-automated and manual means of contact are significantly more expensive to use, ultimately leading to increased costs for consumers.

Additionally, financial institutions are best situated to combat fraud when they are permitted to more freely contact their customers. Through texting with customers, financial institutions can determine in real-time if a suspicious transaction is fraudulent, radically increase the speed of fraud-detection and reduce losses for customers, card issuers and merchants, and approve more transactions for customers at the point of sale by quickly identifying legitimate transactions and blocking future fraudulent transactions from occurring.

Financial institutions should also be permitted to contact customers with assistance messages in the event of a natural disaster or other major situation that may cause financial hardship. Often in these scenarios, financial institutions automatically provide programs to best ensure the financial well-being of their customers. Providing for an exemption from liability for communications informing customers of steps being taken to protect them in the case of a natural disaster or other situation causing financial hardship will allow financial institutions to better protect the financial security of its customers.

¹² See *Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 27 F.C.C. Rcd. 1830.

¹³ See *TCPA Litigation Sprawl A Study of the Sources and Targets of Recent TCPA Lawsuits*, U.S. Chamber Institute for Legal Reform (August 2017), <http://www.instituteforlegalreform.com/research/tcpa-litigation-sprawl-a-study-of-the-sources-and-targets-of-recent-tcpa-lawsuits>.

CBA's members need the ability to contact those consenting customers who have willingly signed-up for communications from their financial institution to best protect the financial well-being and safety of their customers. The Ninth Circuit's decision will ultimately lead to diminished communications between financial institutions and their customers, harming millions of consumers who need the communications financial institutions provide.

Further, the Ninth Circuit's decision in *Marks* was wrongly decided, in part because the decision ignores the text of the TCPA. The overly-broad reading goes so far beyond the language in the TCPA, it essentially rewrites the statute to the Court's liking. This decision represents an overstep by the Ninth Circuit, as clearly forbidden by courts in the past.¹⁴

How the FCC Should Handle the Issues Presented by the Ninth Circuit's Decision

In May, 2018, CBA, along with other petitioners, signed on to the petition for declaratory ruling filed by the U.S. Chamber Institute for Legal Reform¹⁵ asking the Commission to clarify the definition of an ATDS in light of the District Court's decision.

In our petition, CBA argues that the Commission should promptly:

- (1) confirm that to be an ATDS, equipment must use a random or sequential number generator to store or produce numbers and dial those numbers without human intervention, and
- (2) find that only calls made using actual ATDS capabilities are subject to the TCPA's restrictions.¹⁶

CBA continues to urge the Commission to clarify that a "random or sequential number generator" must be truly "random" or "sequential." For example, the Commission's guidance should clearly state that a "random or sequential number generator" involves the use of an automated program to call all phone numbers from "302-354-0000" through "302-354-9999." Furthermore, the FCC should also clarify that a "random or sequential number generator" is not the use of a program—automated or manual—that schedules calls or dials from a deliberate and purposeful list or database of phone numbers of customers or prospects who have made an inquiry to a business.

Clear rules with defined, workable terms from the Commission will help establish best practices for callers, and can help our members make the communications desired by customers without inadvertently violating the TCPA. Further guidance on the 2003 & 2008 Commission orders on predictive dialers, as well as guidance to create a workable test for human intervention could also help provide callers with more informed means to contact their customers, and help to address discrepancies in the courts.

¹⁴ *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994); *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S. Ct. 1146, 1149 (1992) ("When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete;'""); *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) ("If the statutory language is plain, we must enforce it according to its terms.").

¹⁵ U.S. Chamber Institute for Legal Reform *et al.*, Petition for Declaratory Ruling, CG Docket No. 02-278 (filed May 3, 2018).

¹⁶ *Id.* at 20.

CBA reiterates that should the Commission act as outlined above, it will do much to quell the disputes between courts, address the issues that are often brought up in frivolous lawsuits against financial institutions, and help ensure that customers receive the consented-to calls they desire.

CBA greatly appreciates the Commission's timely and comprehensive response to the Ninth Circuit's decision in *Marks*, and looks forward to further engaging the Commission on the issues listed above. Comprehensive solutions to the definitions of "random or sequential number generator" and "capacity" of an ATDS will ensure that consumers have access to the vital communications they desire, and our members hope to better provide. If you require any more information on any of the issues outlined above, please do not hesitate to contact the undersigned directly.

Sincerely,

A handwritten signature in cursive script that reads "Stephen Congdon".

Stephen Congdon
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